

In the Matter of)
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)
Petition of BellSouth Telecommunications,)
Inc. For Forbearance Under 47 U.S.C.)
160(c) From Application of Sections) CC Docket No. 03-220
251(c) (3), (4), and (6) in New-Build,)
Multi-Premises Developments)
)

SBC Communications Inc., for itself and its wholly owned affiliates¹ (“SBC”), submits the following reply comments in support of BellSouth’s petition to the FCC to forbear from applying the Act’s unbundling, resale, and collocation requirements² to facilities deployed to serve new build, multi-premises developments (“MPDs”)³ and to the services provided over such facilities to the residential and commercial end users located in such developments.

¹ SBC Communications Inc. (“SBC”) files these Comments on behalf of its subsidiaries, Southwestern Bell Telephone, L.P., d/b/a SBC Oklahoma, SBC Missouri, SBC Kansas, SBC Arkansas and SBC Texas, The Southern New England Telephone Company, Nevada Bell Telephone Company, d/b/a SBC Nevada, Pacific Bell Telephone Company, d/b/a SBC California, Illinois Bell Telephone Company, d/b/a SBC Illinois, Indiana Bell Telephone Company Incorporated, d/b/a SBC Indiana, Michigan Bell Telephone Company, d/b/a SBC Michigan, The Ohio Bell Telephone Company, d/b/a SBC Ohio and Wisconsin Bell, Inc. d/b/a SBC Wisconsin.

³ For purposes of these Reply Comments, SBC refers to both new multi-premise developments and complete re-developments of existing properties where the complete telecommunications facilities and infrastructure are being replaced as “new build MPDs.”

that rates and practices are just, reasonable and not unreasonably discriminatory.⁴ However, they base their arguments on so-called competitive advantages that are either, not linked to the purpose of the Act's unbundling obligations, namely to promote facilities-based competition, or are vastly overstated. Consequently, the CLECs' true objective is clear - to continue a regulatory scheme that burdens the ILECs with all of the financial risk where ILECs clearly do not have any inherent competitive advantages.

SBC's first-hand experience demonstrates that CLECs claims to be competitively disadvantaged are false. Over the past five years, CLECs have won approximately 40% of the residential new build MPDs in SBC's in-region territory.⁵ Thus, CLECs' claims of being disadvantaged are illogical when compared to their success in the marketplace. Obviously, CLECs have access to alternative sources of facilities to have achieved this level of success in the new build MPD market.⁶

The Commission should also reject CLECs' claims that unbundling obligations should apply to new build MPDs to overcome so-called advantages ILECs receive because of a strong reputation or brand recognition.⁷ First of all, SBC's experience indicates that ILECs are not advantaged at all in this regard. Rather, developers seek the most comprehensive service offer for the best available price. More importantly, brand recognition and reputation are characteristics that should be irrelevant to the Commission's evaluation of BellSouth's Petition. Brand recognition and reputation are universal market characteristics that any newcomer to any existing industry must overcome. If the Commission were to use these characteristics in this

⁴ Covad Comments, p.7-8; AT&T Comments, p.18-28.

⁵ Out of a total of 352,877 residential new build MPDs, SBC lost approximately 144,000 units to competition.

⁶ See Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, et. al., CC Docket Nos. 01-338, et. al., FCC 03-36, ¶ 378 (August 21, 2003) ("Triennial Review Order") (finding that competitors have deployed significant route-miles of fiber and CLECs have at least one alternative transport provider available on between 20-50% of their routes).

⁷ AT&T Comments, p. 23; Cbeyond Comments , p. 7.

analysis, the Commission would be never forbear from applying any section of the Act since it's highly unlikely for a new entrant to have stronger brand recognition than an incumbent.

Similarly, in *USTA v. FCC*, the court held that the unbundling analysis must be based on criteria that are directly linked to the ILECs' monopoly. The court emphasized that "[t]o rely on [] disparities that are universal as between new entrants and incumbents in *any* industry is to invoke a concept too broad . . . to be reasonably linked to the purpose of the Act's unbundling provisions."⁸ Instead, the Commission must focus on those characteristics that bear on the ILECs monopoly, like accessibility of network infrastructure. As demonstrated in BellSouth's Petition and SBC's Comments, CLECs and ILECs face the same operational barriers to serve new build MPDs – both must purchase and construct new plant, negotiate access to rights of ways, obtain government permits and hire skilled labor.⁹

In addition, the allegation that ILECs are advantaged in serving new build MPDs because of their existing access to rights of ways is a red-herring.¹⁰ First, it is unlikely for an ILEC to have existing rights of way along the entire route of a new build MPD. Nevertheless, ILECs remain obligated under sections 251(b)(4) and 271(b)(2)(B)(iii) to provide nondiscriminatory access to poles, conduit and rights of way at just and reasonable rates. Consequently, if the ILECs have any existing structure or access to rights of way, the Act mitigates any so-called advantage that an ILEC might have.

Furthermore, ILECs and CLECs, alike, endure the same processes to obtain access to municipal rights of ways. SBC's experience is that most municipalities require a *one-time* application or licensing process to obtain access to municipal rights of way and after carriers obtain approval, they are able to access all municipal rights of way but remain subject to any applicable permit procedures. AT&T's Anthony Giovannucci complains at length about the

⁸ *USTA v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002).

⁹ SBC Comments at p. 2.

¹⁰ AT&T Comments at p. 21; Covad Comments at p. 7-8; ALTS Comments at p. 10.

protracted municipal process and excessive fees associated with obtaining access to rights of way.¹¹ However, the ILECs are burdened by the same issues discussed by Mr. Giovannucci and his claims that ILECs are somehow insulated from these issues are disingenuous. The reality is that the majority of CLECs are not interested in building competing networks because if they were, they would have used the past seven years to secure baseline municipal rights of way agreements rather than continuing to use the municipal process as a crutch to support unwarranted regulation.

In passing, the CLEC commenters also suggest that ILECs are advantaged by a lower cost of capital in new build MPDs.¹² The Commission should swiftly dispose of these unsubstantiated allegations as well. The CLECs jump to this conclusion without providing an ounce of support for their assertion. Any allegation concerning capital cost is baseless without factoring in continuing drains on ILEC capital resources like the ILECs' carrier of last resort obligation.

CONCLUSION

As discussed in BellSouth's Petition and the comments of SBC, Qwest and Verizon, the Commission should forbear from applying section 251(c)(3), (4) and (6) to facilities used exclusively to serve new build, MPDs and to the services provided over such facilities to the residential and commercial end users located in such developments.

¹¹ See Declaration of Anthony J. Giovannucci on behalf of AT&T Corp., ¶¶ 27–32.

¹² AT&T Comments at p. 25.

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CERTIFICATE OF SERVICE

I, Regina Ragucci, do hereby certify that on this 25th day of November 2003, Reply Comments of SBC Communications Inc. in WC Docket No. 03-220, was served first class mail - pre-paid postage to the parties attached.

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